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Brief of Page for Petitioner.

No. 521

DEC 3 18
JAMES H. McKENN

Filed Dec. 3, 1897.

SUPREME COURT OF THE UNITED STATES.

In the Matter of the Application of
JOHN H. WISE, Collector, Etc.,

Petitioner and Appellant,

vs.

CHEW HING LUNG & CO.,

Respondent and Appellee, and
Petitioner in this Court.

Brief on Petition of Chew Hing Lung & Co. for Writ of Certiorari.

CHARLES PAGE,
Counsel for Petitioner.

IN THE

Supreme Court of the United States.

In the Matter of the Application of
JOHN H. WISE, Collector, Etc.,
Appellant,

vs.

CHEW HING LUNG & CO.,
Appellee.

Brief on Petition of Chew Hing Lung & Co. for Writ of Certiorari.

The question involved in this cause is whether certain "tapioca flour" was entitled at the time of importation to entry free of duty, under the McKinley bill, or was dutiable, under the same Act, at the rate of two cents per pound.

The finding of the Circuit Court (find. V, p. 18, opinion, p. 22), which is accepted by the Court of Appeals, and is amply supported by the evidence, by the decision of the Board of General Appraisers, and the rulings of the Treasury Department during the last twenty years, is, that "in the general importing markets of the United States," the article has been and is "commercially known as 'tapioca flour.' In those markets "the term 'tapioca' includes that article in three "forms, viz.: flake tapioca, pearl tapioca, and tapioca "flour." (Find. V, p. 18.)

The importers claimed that the article was described *eo nomine* in the free list, and was duty free. The Act of 1890 provides:

"Sec. 2. * * * Unless otherwise specially provided "for in this Act, the following articles, when imported, "shall be exempt from duty:

"488. **Arrowroot, raw or unmanufactured.**
"695. **Sago, crude, and sago flour.**
"730. **Tapioca, cassava or cassady.**"

The Court further found, however, that the imported article, which "consists of the starch grains obtained "from the manihot root by washing, scraping, and "grating, or disintegrating it into a pulp," and drying, "is nearly pure starch" (find. III, p. 17), and that it is "fit for use as starch in laundry work, *in the sense* "*that by its use clothes can be starched, but it is not com-*"*monly used in such work as starch throughout the United* "*States;* and is not known to be so used except on the "Pacific Coast" (find. VIII, p. 19), where Chinese laundrymen use it for such purpose, and, to a slight extent, as food. White laundrymen, in some instances, in San Francisco, use it to mix with wheat or corn starch (find. IV, p. 18). White people there, in dealing with Chinamen, call the article "Chinese starch."

In the Eastern States the article was used "for starch "purposes by calico printers and carpet manufacturers "to thicken colors, for bookbinding, in the manufacture "of paper, filling in painting, manufacture of a substi-"tute for gum arabic and other gums, also as an adul-"terant in the manufacture of candy in some cases, and "other articles" (find. VII, p. 19).

Upon these facts, the Collector insisted that the article was properly dutiable under paragraph 323:

"Starch, including all preparations, from whatever "substance produced, fit for use as starch, two cents per "pound."

The Circuit Court held that the article had been properly decided to be free by the Board of General Appraisers, and affirmed their action.

Upon appeal, the Court of Appeals, *upon the findings*, reversed the Circuit Court, holding that the designation of the article *eo nomine* as free must give way to what it decided to be *a more specific provision* regarding it, viz.: that, as "a preparation fit for use as starch," Congress intended it should pay a duty. The findings of the Circuit Court were held to sufficiently establish such fitness for use as starch.

The petitioner submits that the classification ordered by the Court of Appeals was erroneous, because:

I.

The article was designated by its commercial name as free. Such specific designation must control a general description, whether of quality or use, in the absence of evidence, in the act, which shows a special intent by Congress that in a given case or condition, the article shall be classified otherwise than as free.

"The commercial designation, as we have frequently "decided, is the first and most important designation "to be ascertained in settling the meaning and appli- "cation of tariff laws."

Robertson vs. *Solomon*, 130 U. S., 412.

Sonn vs. *Magone*, 159 U. S., 422.
Cadwalader vs. *Zeh*, 151 U. S., 171.
Dejonge vs. *Magone*, 159 U. S., 562.

"When Congress has designated an article by its spe-
" cific name, and imposed a duty upon it by such
" name, general terms in a subsequent act, or in a later
" part of the same act, although sufficiently broad to
" comprehend such article, are not applicable to it."
Arthur vs. *Lahey*, 96 U. S., 118.

The word "handkerchiefs" was held to be denominative of the article imported and to control the descriptive words "linen embroideries," although the handkerchiefs were of linen and embroidered. The "test of embroidery," otherwise applicable, must give way to the specific designation.

Robertson vs. *Glendenning*, 132 U. S., 158.
Barber vs. *Schell*, 107 U. S., 617.

Oil, obtained by distillation, which was a form of paraffine, though not the article known as "paraffine oil," was held to be free as "paraffine" and not dutiable as a product or preparation known as "distilled oil." * * * "The use by Congress of the single word
" 'paraffine," without any qualification, manifests an
" intention to cover, at least, all varieties of the article
" which were known when the act was passed."
Shoellkopf vs. *U. S.*, 71 Fed., 694 (C. C. A.).

"Acids" being free and "preparations of coal tar"
" dutiable, the Court of Appeals said: "As one (clause)

" imposes duty and the other exempts from duty, it is " obvious that Congress did not intend both provisions " to apply to the same article." The article being an acid, it was held to be designated *eo nomine* and, therefore, free.

Matheson vs. *U. S.*, 71 Fed. R., 394.

" Tapioca " was on the free list when the Act of 1890 was passed, as it had been for twenty years. " Tapioca flour " has always been an acknowledged form of tapioca; it is that article in its crudest form. The commercial designation as such was unquestioned by the Circuit and Appellate Courts. The Treasury Department, as shown by repeated rulings printed in an appendix to this brief, has always recognized its name and character and enforced its right to free entry.

See 16 Stat., 268, Rev. Statutes, Sec. 2505.
Act of 1883, 22 Stat., 521.

Under such circumstances, the rulings of the Department carry much weight in the courts.

Robertson vs. *Downing*, 127 U. S., 613.
U. S. vs. *Hill*, 120 U. S., 169, 182.
U. S. vs. *Wotten*, 50 Fed. R., 693, *affirmed in* 53
53 F. R., 344.
Swayne vs. *Hager*, 13 Saw., 621.

The Court of Appeals, in the case now at bar, decided that the general language of the Starch Clause, assessing duty on " starch or any preparation fit for use as starch " was, by reason of the *use* therein mentioned, a

more specific provision than the designation by commercial name. *Magone* vs. *Heller*, 150 U. S., 70, was found to be authority for this position. In this, we submit, that the Court was clearly wrong. We cannot see how an interpretation can be placed on that case which is so far at variance with understood rules. Under the ruling adopted, sago and arrowroot, both chemically pure starches and both on the free list, would also be dutiable. Tapioca flour is sometimes called Brazilian arrowroot (U. S. Dispensatory, p. 1754). It needs only the application of heat to make it pearl and flake tapioca, both well known food substances (find. III, p. 17.)

In *Solomon* vs. *Arthur*, 102 U. S., 208), it had been held that the words "manufactures of mixed materials, in part "of cotton," etc., were not a "name for goods." * * * "We think, said the Court, "it is very clear they are "merely descriptive." * * * "It is sometimes the "case, no doubt, that certain articles are so obviously "intended to be included in a particular grouping or "classification, as to *repel* any suggestion that they are "meant to be embraced in a different part of the law, "though literally applicable to them. But this can not "be said in the case now before us. *The goods in ques-*"*tion have no such inseparable relation to one form of* "*description exclusive of the other;* nor are they so clearly "intended to be embraced in any particular grouping "or classification, as to repel or prevent the application "to them of the clause under which they were as-"sessed."

If there can be no question of the fact that tapioca

flour commercially falls under the name of tapioca, we submit that it would be difficult, indeed, to find in the general words, "any preparation fit for use as starch," such an expression of the "obvious" intention of Congress as would "repel or prevent the application" to it of the rate of duty by designation *eo nomine*. If we consider, further, the fact that tapioca, sago, and arrowroot are all chemically pure starch, that they are all food substances, used in the sick room; that any of these articles may, to some extent, and by reason only of its starchy qualities, be used for laundry purposes, and that none of them can have any use except as starch in some way, and that this quality has been that which for years has made it desirable that the substances should be free, all of which facts "Congress must be presumed to have known," (*Dejonge* vs. *Magone*, 159 U. S., 567) we shall find ourselves driven, in support of the judgment of the Court of Appeals, to say that the free list, as to these articles, was intended by it *to have no operation whatever*, and that words used in all the tariff acts since 1870 ceased to have their well understood meaning when they were again used in the Act of 1890.

Magone vs. *Heller*, 150 U. S., 70, we submit, was not correctly read by the Court of Appeals. In that case this Court held that the intention of Congress to make free any chemical product (though by name dutiable), if it should be "expressly used for manure," was "*manifest*" from the fact that, in the clause declaring such manure substances free, articles otherwise dutiable

as chemical products, were mentioned by name as free, if of use for fertilizing the ground, within the meaning of the free list. This decision was within the rule of *Solomon* vs. *Arthur* (*sup.*), which conceded the possibility of an exception to the rule of specific designation in cases where "certain articles are so obviously intended "to be included in a particular grouping or classification as to *repel any suggestion* that they are meant to "be embraced in a different part of the law, though "literally applicable to them."

But the starch clause contains no words manifestly, or in any way indicating that its terms shall include articles named in the free list, nor is there anything in *Magone* vs. *Heller* which justifies the assumption that, because an article on the free list may be used, by reason of its chemical qualities in place of starch, to some extent, it shall, therefore, be taken from that list and made dutiable as starch. The reasoning of this Court excludes the thought that if the words there under construction had been merely "manures and all substances fit for manure," it would have held that chemical products, dutiable *eo nomine*, were intended to be free because such products could be, in some degree, used for manure.

Mason vs. *Robertson*, 139 U. S., 624, would seem to deny to *Magone* vs. *Heller* the interpretation placed upon it by the Court of Appeals. In that case this Court held that bichromate of soda, though not mentioned *eo nomine*, was specially enumerated in the chemical schedule by the words "all chemical compounds and salts by

"whatever name known," and did not fall as a non-enumerated article, under the similitude clause, to be rated upon a comparison of "material, quality, texture, "or the use to which it may be applied." In the case at bar, the effort to make "tapioca flour" dutiable is based upon the general language of a clause providing for articles bearing similitude to starch in quality and use.

It seems to be clear that Congress did not intend that a substance, designedly placed by its commercial name on the free list because of its single and only chemical quality as starch, should also, because of that very same quality, be dutiable as a preparation fit for use as starch.

The Court below must have fallen into an error in holding that the indefinite and general language of the starch clause was a more specific provision than the designation *eo nomine* of the free list.

II.

The classification ordered by the Court was also erroneous, we respectfully submit, in its determination that tapioca flour was a preparation fit for use as starch because:

The imported article was not a "preparation." Again:

"Fitness for use as starch," within the meaning of the law, must mean fitness for use as commercial starch, which fitness must be shown by its predominant use for like purposes with commercial starch.

"Tapioca flour" is not a "preparation." It is a chemical starch, in its crudest and first form. It has

undergone no process of manufacture, no change since it was separated from the fibrous material of the plant by scraping and washing (find. III, p. 17).

The Revised Statutes (Sec. 2505) assessed starch in the following words: "Starch *made* of potatoes or corn, "one cent per pound, * * *made* of rice or any other "material, three cents per pound. * * "

The Act of 1883 said: "Potato or corn starch, two "cents per pound, rice starch, two and one-half cents, "other starch, two and one-half cents per pound."

Tapioca and cassava were on the free list of each of these laws.

In *Chung Yune* vs. *Kelly*, 14 Fed. R., 639, the question came before Judge Deady whether the very article now under consideration, which was "for the greater "part composed of starch granules and (which) may be "used for starch" was "starch * * made of rice "or any other material." The Court asked the jury whether the article was "a starch known to commerce "as such, and made and intended to be used primarily "by laundrymen in the stiffening and polishing of "clothes." It assented to the correctness of a verdict in the negative and held that the article was not "made or manufactured starch or known to commerce as such." It, also, held that its designation *eo nomine* made it free in any case.

In *Townsend* vs. *U. S.*, 5 C. C. A., 489, the Court of Appeals for the Second Circuit held regarding the same article, that it had "never been manufactured into commercial starch," though, chemically, a starch.

This last decision was upon the claim made by the Collector that "tapioca flour" was a "preparation fit for use as starch."

The Court of Appeals in the decision now asked to be reviewed held that the facts established the fitness of tapioca flour for use as starch. These facts were, *first*, its actual use in laundry work by Chinese laundrymen on the Pacific Coast and by some white laundrymen, who mixed the article with commercial starch to a slight extent; *second*, the general use of tapioca flour throughout the Eastern States for thickening colors, bookbinding, paper making, ink making, manufacture of a substitute for gum arabic, etc., etc., such uses being "for starch purposes." As pure starch can have no use other than as starch, in the chemical sense, the finding of the fitness of tapioca flour for use as starch is literally correct. Is this the use "as starch" intended by the Act of Congress to be the test of the dutiability of the imported article?

We submit that it is not. The actual use of tapioca flour for laundry purposes by a handful of Chinese on the Pacific Coast, does not prove fitness for use by the millions of inhabitants of the country. A fair practical illustration of this fact is found in the Appraiser's decision, No. 1817, reprinted on page **23** of this brief. "Olive oil for manufacturing or mechanical purposes and unfit for eating" was free under the Act of 1890. "Olive oil, fit for salad purposes," was dutiable. The imported article was shown to be used by large numbers of Italians and Spanish of the poorer classes in our

large cities for salad purposes, and one witness testified that it could be rendered fit for eating by "cutting down with cotton-seed oil." It was shown that the American people used the article for oiling machinery, not for eating. The Appraisers held that "fit for salad purposes" means "ordinarily regarded as fit for eating purposes, as determinable by its use for such purposes," and that the peculiar habits of a few thousand foreigners, brought from the home whence poverty had, perhaps, driven them, cannot control the classification of an article for 65,000,000 of people.

The fitness of tapioca flour for starch purposes has not been established by any proof of its use throughout the land. The findings and the evidence clearly show that such use is confined to a few foreigners in one part of the country. It has never had a place in the markets as commercial starch, or as a substitute for that article, notwithtanding the fact (found by the Court) that, previous to the imposition of the duty, it was much cheaper than manufactured starch, a circumstance naturally stated to be "significant" on this question in *Townsend* vs. *U. S.* (*sup.*). In the case last cited, the Court was presented with some testimony of its use in the laundry, but it considered the weight of the evidence to be against the fact of such use. It held that tapioca flour was "not manufactured in this country into the article known as starch" and that it "was not known as a substitute therefor," and that its actual use for purposes analogous to those for which commercial starch is used, did not make it "starch, or a preparation fit for

use as starch." The word "fit," as used in the tariff, means "commercially fit." (*Paper Co.* vs. *Cooper*, 46 Fed. R., 186.) Even "common use" does not of itself make a thing "suitable"; (*White* vs. *U. S.*, 69 Fed R., 93) it must be "actually, and not theoretically fit for use." (*Townsend* vs. *U. S.*, *sup.*)

It is well settled that neither the intention of the importer, nor the use after importation of any article, can determine its classification. (*Magone* vs. *Heller*, *sup.*) "In order to produce uniformity in the imposition of "duties, the dutiable classification of articles imported "must be ascertained by an examination of the im- "ported article itself, in the condition in which it is "imported. In order to be dutiable as 'watch mate- "rials,' the article, when imported, must be in such "form of manufacture as to show its *adaptation* to the "making of watches." (*Worthington* vs. *Robbins*, 139 U. S., 341) In other words, the fitness of the article for use in the manufacture of watches must be evident to the customs officer. "In order to be 'watch mate- "rials,'" said the Court, "the article must in itself "bear marks of its special adaptation for use in making "watches. The fact that the article in question was "used in the manufacture of watches has no relation to "the condition of the article as imported, but to what "afterwards the importer did with it."

The article now before this Court could be described by the customs officer by one name only. It is tapioca. No one would dream of calling it starch, or a preparation fit for use as starch. It bears no mark of "special

adaptation" to such use. If imported at New York or New Orleans, the closest inquiry would bring forth no knowledge of its fitness for any use other than as food, or as a chemical starch suitable to mix in colors, to make paste, ink, and hundreds of things. No one would say it was designed for use in the laundry.

This Court has determined that articles imported as "parts of clocks" are dutiable as such, if they are chiefly used as parts of clocks. If, however, they are as well applicable to mirrors or coach lamps as to clocks, they can then have no distinguishing characteristics as "parts of clocks."

Magone vs. *Wiederer*, 159 U. S., 559.
Sonn vs. *Magone*, 159 U. S., 418.

The Court below, in *Hartranft* vs. *Langfeld*, 125 U. S., 129, had charged the jury: "It is the use to which "these articles are chiefly adapted" (fitness for use), "and for which they are used that determines their "character, within the meaning of this clause of the "tariff act. * * * It is the predominant use to "which articles are applied that determines their char-"acter." The charge was affirmed by this Court and again approved by it in *Cadwalader* vs. *Wanamaker*, 149 U. S., 539.

See also *Robertson* vs. *Edelhoff*, 132 U. S., 624.

"Ordinary use" furnishes the guide for classification.
Sonn vs. *Magone*, 159 U. S., 421.

This Court in a late case said: "*Magone* vs. *Heller* "held that chief use was to be ascertained by that

" which was commonly, practically, and generally done,
" and was not to be overthrown by an occasional excep-
" tion for practical or experimental purposes."

Magone vs. *Wiederer*, 159 U. S., 562.

The phrase, " substances expressly used for manure," was decided in *Magone* vs. *Heller* to mean " substances " substantially available only for purposes as manure," *i. e.*, practically fit for use as manure only. If the language there construed had been " substances fit for use " as manure," the Court would, undoubtedly, have held " that ' fit for use ' must be read to mean ' practically " ' fit only for use as manure.' "

The finding of the Court in the case at bar was that tapioca flour was not " commonly used " for laundry purposes in the United States. Its chief use, and to say the least, a very large use, was undoubtedly in the manufactures, as stated in the findings.

Evidently the Court of Appeals considered this use to be a use " as starch." The article being a pure starch, chemically speaking, could not, in one sense, have any possible use except " as starch." Its one quality forbade its use for any purpose except such as needed, or was aided by, a chemical starch. We submit, however, that it was not the intention of Congress, when it used the words " fit for use as starch," to say that every chemical starch used in the manufactures should pay a duty as starch, but that preparations (of course, not otherwise specifically designated), *whose predominant use was as commercial starch*, should be dutiable.

Tapioca flour was neither sold or known as commercial starch, "or as a substitute for it, except, as we have seen, by the Chinese on the Pacific Coast, where among those dealing with this people, it is locally spoken of as "Chinese starch." It did have many uses as a chemical starch, *for which purposes Congress for twenty years before the Act of 1890 permitted its free entry into the country.* During all this period starch, *i. e.* commercial starch, was dutiable. Nothing can be clearer than the fact that during this interval Congress recognized the distinction between the uses of commercial starch and mere chemical starches. During the same period the Treasury Department again and again declared that "tapioca flour" was not starch, though its uses were brought before it. Judge Deady held that it was not starch. (*Chung Yune* vs. *Kelly*, 14 Fed. R., 639) His judgment was not appealed from. Again, in *Tong Duck Chong* vs. *Kelly*, 24 Fed. Cases, p. 76 (No. 14,093), the same distinguished judge held that sago flour was not dutiable as starch, though chemically such, and though it was shown to be used for laundry purposes.

If, during all these years, tapioca flour has always been known to the tariff as tapioca and not as starch, *its use as food and in the manufactures during the same period has been as "tapioca" and not "as starch."* The re-enactment of the free list in the Act of 1890 in the same words as had been used for so long a time was, under a well-settled rule, a declaration by Congress that tapioca flour should continue to be free for the uses to which it had always been put. In this particular case,

the necessity of the application of the rule becomes apparent, in view of the fact that unless this be done, the designation *eo nomine* as free will have absolutely no meaning at all.* Pure starch can have no use except as starch. Tapioca flour, a pure starch, can be used only for starch purposes.

It was long ago decided by this Court that where an article has been for years held dutiable under a specific designation in a tariff which also contains another clause under which the article would be dutiable in the absence of the first, a change in the tariff dropping the clause under which the article had previously been classified and retaining the other, would have the effect of making the article *a non-enumerated article*. Though within the words of the retained clause, it would not be within its meaning, because Congress, under the former acts, had indicated that it should not be so classified.

De Forest vs. *Lawrence*, 13 How., 274.

The converse of this proposition must be equally true. A classification, long existing, will be deemed to have been intended to continue when the article is referred to in a new law by the same words as in former acts, to the exclusion of a possible classification under another and novel clause which may, by general descriptive words, seem also to include the article.

The place given to the free list in the statute, subsequent to that of the starch clause in the same Act, should not be lost sight of. If the construction placed upon the starch clause by the Court of Appeals that tapioca flour is fit for use as starch be correct, then *ut*

magis valeat res quam pereat, the later clause should prevail, "as indicating the last and final expression or "determination of the lawmakers."

Powers vs. *Barney*, 5 Bltchford, 202.

On the hearing of this cause it was agreed that either party might offer the decisions of the Treasury Department to prove its practice regarding the assessment of duties on tapioca flour. (Trans., p. 29.)

We print these decisions as an appendix to this brief. We also beg to be allowed to refer the Court, if it seem to be worth its attention, to the testimony on the subject of the use of tapioca flour as commercial starch, *i. e.*, for laundry purposes, and the opinions given regarding its fitness for such use.

We submit, respectfully, that the petitioner should be granted the writ prayed for.

CHAS. PAGE,
Attorney for Petitioner.

APPENDIX

DECISIONS OF TREASURY DEPARTMENT, 1877–1890.

(3161.)

TAPIOCA FLOUR—FREE ENTRY OF.

Treasury Department, March 23, 1877.

Sir—The Department is in receipt of your letter of January 16 last, submitting the appeal (2972 e) of Mr. C. Wakefield from your assessment of duty at the rate of 20 per cent. ad valorem on certain tapioca flour imported by him, per "Marmion" from Singapore, December 28, 1876, and claimed to be entitled to free entry under the provision for "tapioca," in the free list, Revised Statutes.

It appears, upon investigation, that tapioca is prepared in three forms, namely: flake, pearl, and flour, and that these terms do not indicate any substantial difference in the character or quality of the article, but merely indicate its form or appearance.

The Department is of opinion that the tapioca flour in question is entitled to free entry, as claimed by the importer, and you are authorized to readjust the entry accordingly, and to forward a certified statement for the refund of the duties exacted thereon.

Respectfully,

JOHN SHERMAN,

Secretary.

Collector of Customs, Boston, Mass.

(5802.)

FREE ENTRY—TAPIOCA FLOUR.

Treasury Department, July 7, 1883.

Sir—The free list of the Act of March 3, 1883 (T. I., new, 772), provides for "root flour," and also (T. I., new, 800), for tapioca, cassava, or cassada.

The Department holds that, under these provisions, flour made from tapioca, cassava, or cassada root may be admitted free of duties, without regard to the use for which it is ultimately intended, and, consequently, that the provision (T. I., new, 269), of the tariff for "other starch" does not apply to such flour.

You will take action accordingly.

Very respectfully,

H. F. FRENCH,
Acting Secretary.

Collector of Customs, San Francisco, Cal.

(7971.)

TAPIOCA—FREE OF DUTY, THOUGH SPECIALLY IMPORTED FOR AND USED AS STARCH.

Treasury Department, January 11, 1887.

Sir—The Department is in receipt of your letter of the 25th of October last, transmitting the appeals (8788 o, 8789 o, 8790 o, and 8791 o), of Kwong Hang On & Co., Chy Lung & Co., Lun Kwong Chong & Co., and Tong Foo & Co., from your decision assessing duty at the rare of 2½ cents per pound on certain starch imported by them under various names, such as sago, sago flour, tapioca, &c., per "San Pablo," "Rio de Janeiro,"

and "St. David," August 9 and September 7 and 9, 1886, respectively, and claimed to be exempt from duty under the provisions in the free-list (T. I., new, 772, 774, and 800), for "root-flour," "sago, sago crude, and sago flour," and "tapioca, cassava, or cassada."

It appears that you classified the article in question under the provision in Schedule G (T. I., new, 269), for "other starch," for the reason that it is imported, and is actually used as starch by the Chinese laundries throughout the States and Territories.

It was, however, decided by the Department on July 7, 1883 (Synopsis 5802), that under the above-cited provisions in the free list, flour made from tapioca, cassava, or cassada root may be admitted free of duties, "without regard to the use for which it is ultimately intended," and the collector of customs at New York, to whom the samples forwarded with your letter had been submitted, reports, under date of the 29th ultimo, that while the merchandise represented by the samples was found by the United States chemist to be chemically a starch obtained from the root of "Janipha manihut," or "Jatropha manihot," it is in its commercial character "tapioca;" that it is so returned by the appraiser under Synopsis 3161, and that on such return the merchandise is admitted free of duty at his port.

In view of this report, and of the above-cited decisions of the Department, and the provisions in the free list referred to by the appellants, you are hereby authorized to reliquidate the entries specified in said

appeals, exempting the merchandise covered thereby from duty.

Respectfully yours,

C. S. FAIRCHILD,

Assistant Secretary.

Collector of Customs, San Francisco. Cal.

(9031.)

ROOT-FLOUR OF TAPIOCA, FREE OF DUTY, THOUGH INTENDED FOR USE AS A STARCH.

Treasury Department, September 21, 1888.

Sir—The Department duly received your letter of the 30th of April, 1888, transmitting the appeal (1392 s) of Messrs. Kwong, Cheong Hing from your decision assessing duty at the rate of 2½ cents per pound on certain so-called "flour" imported into your port, per "Lennox," July 25, 1887, claimed by the appellants to be free of duty under the provisions in the free-list (T. I., 772) for "root-flour," and originally returned by the appraiser at the rate assessed under the provision in Schedule G (T. I., 269) for "other starch."

The appraiser, in his report of the 20th ultimo, called for by the Department on the 14th of May last, states that samples of the merchandise in question were submitted to the United States chemist at your port, who found the article to be tapioca starch, and that, in view of Department's decision of July 7, 1883 (Synopsis 5802), and January 11, 1887 (Synopsis 7971), which hold that flour made from tapioca, although chemically a starch, may be admitted free of duties under the pro-

vision for "tapioca" (T. I., 800), without regard to the use for which it is ultimately intended, the appeal would appear to be well founded.

You are, therefore, authorized to reliquidate the entry, and to take measures for refunding the duties exacted.

Respectfully yours,

I. H. MAYNARD,
Acting Secretary.

Collector of Customs, New York.

(13545. G. A. 1817.)

OLIVE OIL UNFIT FOR SALAD PURPOSES.

Before the U. S. General Appraisers at New York, November 2, 1892.

In the matter of the protests, 1604 b—7436 of E. J. Lavino & Co., against the decision of the Collector of Customs at Philadelphia, as to the rate and amount of duties chargeable on certain olive oil, imported per "British Prince," April 5, 1892.

Opinion by Somerville, General Appraiser.

The merchandise in question is olive oil, imported from Smyrna, in April, 1892.

The local appraiser at Philadelphia reports that in his judgment "it is not fit for table use, although it is undoubtedly so used by certain classes of foreigners among us."

The importers, in the hearing held at Philadelphia, testified that it was imported in bond and was shipped by thousands of tons from Smyrna to England, Ger-

many, and America, for use as machinery oil; that they sold it to wool manufacturers, and had never been able to find a customer who would use it for eating purposes.

One witness, who dealt in olive oil, testified that it is rendered fit for eating purposes by being "cut down with cotton-seed oil." All the witnesses concur in the conclusion that it is a very low grade of olive oil, and the weight of the testimony is to the effect that it is not ordinarily used as a salad oil or for eating purposes by persons generally in this country, but only by a certain class of Italian citizens, who exclusively use it.

The examiner of oils in the appraiser's department at New York testifies that such oil is "used by Italians in large numbers in New York City," and by some Spaniards, but "not by Americans to any extent," or by any other classes.

The merchandise was classified by the collector, under paragraph 44 of the new tariff act, as "olive oil, fit for salad purposes," and assessed at 35 cents per gallon.

It is claimed as free of duty under paragraph 661, "as olive oil for manufacturing or mechanical purposes, unfit for eating, and not otherwise provided for" in said tariff act.

We are of the opinion that the phrase "fit for salad purposes" means ordinarily regarded as fit for eating purposes, as determinable by its use for such purposes. If it is only used by a small class of persons (a few thousand at most) of a particular nationality, or who immigrate from a particular country (it may be from stress of poverty or from national idiosyncracy), that

fact does not control the classification for the sixty-five millions of inhabitants of this country.

We accordingly find as facts:

(1) That the olive oil in question is fit for manufacturing and mechanical purposes and was imported for that use, and is commonly and chiefly used for such purposes.

(2) That it is rarely used for eating or salad purposes, and then only by a small class of citizens, mainly Italians; and that it is not fit for salad or eating purposes within the meaning of the present tariff act.

The board passed on an importation of olive oil substantially of the same kind with this, in decision G. A. 565, and held that it was not fit for eating purposes.

The protest is sustained and the collector's decision reversed. He is instructed to reliquidate the entry accordingly.

The Evidence as to the Fitness of Tapioca Flour for Use as Starch.

In the case at bar, the fitness of the article for use as starch, so far as reliance is placed on actual use, is insisted upon, because a few hundred Chinese laundrymen throughout this coast avail themselves of it for laundry purposes. Whether they mix it with wheat or corn starch in their work, we do not know, but the few American laundrymen who testified to its uses, all agree that it is good for mixing purposes only. (*Williams*, 113; *Doherty*, 118.) The last named witness mixes it in the ratio of one-tenth. (120.) Some of the laundry-

men produced specimens of starched clothes which had been made up by themselves with "China starch." They thought good work could be done with it, but on cross-examination they all declined to admit that the results produced before the Appraisers were good specimens of what their laundries could do. (*Bartlett*, 116; *Ferguson*, 135.) *Bartlett*, 115, said there was more economy in the more expensive starches; they do quicker and better work. An employee will do one-third more work with better starch. If wheat starch did not do better in working every day, he would not pay almost double for it. (117.) *Doherty* admits that China starch was largely cheaper than American starch a few years ago, and says he would not care about using it alone. (120.) *Ferguson* says he does not consider the work done by it to be superior work. (137.) These witnesses prove that the article cannot be profitably used as starch. Price, the chemist, says that, in all his reading and experience, he had never come across any mention of the use of the article for laundry purposes. (100.) These witness were produced by the Collector.

Falkenau (193), the chemist, made a practical test of the article, as a starch. He found that it took a longer time to boil than wheat or corn starch. *Cumbalk*, the dealer in starches, says that the superiority of wheat over corn starch lies in the quickness of the penetrating power of the former, and thereby its labor saving quality, (224). Falkenau further found that the "tapioca flour," *after boiling*, showed more unruptured cells.

The rupturing of the cells releases the starchy substance and makes it available. The presence of unbroken cells makes the starch rough. The color of garments starched with it was not as white. It was of a yellowish cast, and did not appear as smooth. There was, also, a peculiar odor to it. (194.)

It is thus evident that the article, though actually used by a class in San Francisco and vicinity for starching purposes, and, though susceptible of being manufactured into starch, is not fit for use as starch *in the commercial meaning of the words.* It is not accepted by the community at large, because it yields less of the starchy substance, requires more labor in its application, and does not do good work. Its results are neither white nor smooth, the essentials of starch, as known to commerce. These elements determine its unfitness, commercially, as a competitor with other starches.

Cumbalk (221), who has visited all the steam laundries, almost, of the country, never heard of the use of the article in question as starch.

Service of a copy of the within
is hereby admitted this 22
of November 1897.

H. J. Foote U.S. Atty
By Samuel Knight Asst. U.S. Atty
Counsel for John H. Wa
Collector.

No. 202.

JAN 19 1899

JAMES H. McKENNEY, Clerk.

Brief of Page, Britton & Browne for Petitioner

Filed Jan. 19, 1899.

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 202.

CHEW HING LUNG & CO., PETITIONERS,

vs.

JOHN H. WISE, COLLECTOR, &c.

BRIEF FOR PETITIONERS.

CHARLES PAGE,
Attorney for Petitioners.

A. T. BRITTON,
A. B. BROWNE,
Of Counsel.

IN THE

Supreme Court of the United States.

IN THE MATTER OF THE APPLICATION OF
JOHN H. WISE, COLLECTOR, ETC.,
Appellant,

vs.

CHEW HING LUNG & CO.,
Appellee.

Brief on Petition of Chew Hing Lung & Co. for Writ of Certiorari.

The question involved in this cause is whether certain "tapioca flour" was entitled at the time of importation to entry free of duty, under the McKinley bill, or was dutiable, under the same Act, at the rate of two cents per pound.

The finding of the Circuit Court (find. V, p. 18, opinion, p. 22), which is accepted by the Court of Appeals, and is amply supported by the evidence, by the decision of the Board of General Appraisers, and the rulings of the Treasury Department during the last twenty years, is, that "in the general importing markets of the United States," the article has been and is "commercially known as 'tapioca flour.' In those markets "the term 'tapioca' includes that article in three "forms, viz.: flake tapioca, pearl tapioca, and tapioca "flour." (Find. V, p. 18.)

The importers claimed that the article was described *eo nomine* in the free list, and was duty free. The Act of 1890 provides:

"Sec. 2. * * * Unless otherwise specially provided "for in this Act, the following articles, when imported, "shall be exempt from duty:

"488. **Arrowroot, raw or unmanufactured.**
"695. **Sago, crude, and sago flour.**
"730. **Tapioca, cassava or cassady.**"

The Court further found, however, that the imported article, which "consists of the starch grains obtained "from the manihot root by washing, scraping, and "grating, or disintegrating it into a pulp," and drying, "is nearly pure starch" (find. III, p. 17), and that it is "fit for use as starch in laundry work, *in the sense* "*that by its use clothes can be starched, but it is not com-* "*monly used in such work as starch throughout the United* "*States;* and is not known to be so used except on the "Pacific Coast" (find. VIII, p. 19), where Chinese laundrymen use it for such purpose, and, to a slight extent, as food. White laundrymen, in some instances, in San Francisco, use it to mix with wheat or corn starch (find. IV, p. 18). White people there, in dealing with Chinamen, call the article "Chinese starch."

In the Eastern States the article was used "for starch "purposes by calico printers and carpet manufacturers "to thicken colors, for bookbinding, in the manufacture "of paper, filling in painting, manufacture of a substi- "tute for gum arabic and other gums, also as an adul- "terant in the manufacture of candy in some cases, and "other articles" (find. VII, p. 19).

Upon these facts, the Collector insisted that the article was properly dutiable under paragraph 323:

"**Starch, including all preparations, from whatever "substance produced, fit for use as starch, two cents per "pound.**"

The Circuit Court held that the article had been properly decided to be free by the Board of General Appraisers, and affirmed their action.

Upon appeal, the Court of Appeals, *upon the findings*, reversed the Circuit Court, holding that the designation of the article *eo nomine* as free must give way to what it decided to be *a more specific provision* regarding it, viz.: that, as "a preparation fit for use as starch," Congress intended it should pay a duty. The findings of the Circuit Court were held to sufficiently establish such fitness for use as starch.

The petitioner submits that the classification ordered by the Court of Appeals was erroneous, because:

I.

The article was designated by its commercial name as free. Such specific designation must control a general description, whether of quality or use, in the absence of evidence, in the act, which shows a special intent by Congress that in a given case or condition, the article shall be classified otherwise than as free.

"The commercial designation, as we have frequently "decided, is the first and most important designation "to be ascertained in settling the meaning and appli- "cation of tariff laws."

Robertson vs. *Solomon*, 130 U. S., 412.

Sonn vs. *Magone*, 159 U. S., 422.
Cadwalader vs. *Zeh*, 151 U. S., 171.
Dejonge vs. *Magone*, 159 U. S., 562.

"When Congress has designated an article by its specific name, and imposed a duty upon it by such name, general terms in a subsequent act, or in a later part of the same act, although sufficiently broad to comprehend such article, are not applicable to it."

Arthur vs. *Lahey*, 96 U. S., 118.

The word "handkerchiefs" was held to be denominative of the article imported and to control the descriptive words "linen embroideries," although the handkerchiefs were of linen and embroidered. The "test of embroidery," otherwise applicable, must give way to the specific designation.

Robertson vs. *Glendenning*, 132 U. S., 158.
Barber vs. *Schell*, 107 U. S., 617.

Oil, obtained by distillation, which was a form of paraffine, though not the article known as "paraffine oil," was held to be free as "paraffine" and not dutiable as a product or preparation known as "distilled oil." * * * "The use by Congress of the single word 'paraffine,' without any qualification, manifests an intention to cover, at least, all varieties of the article which were known when the act was passed."

Shoellkopf vs. *U. S.*, 71 Fed., 694 (C. C. A.).

"Acids" being free and "preparations of coal tar" dutiable, the Court of Appeals said: "As one (clause)

" imposes duty and the other exempts from duty, it is " obvious that Congress did not intend both provisions " to apply to the same article." The article being an acid, it was held to be designated *eo nomine* and, therefore, free.

Matheson vs. *U. S.*, 71 Fed. R., 394.

" Tapioca " was on the free list when the Act of 1890 was passed, as it had been for twenty years. " Tapioca flour " has always been an acknowledged form of tapioca; it is that article in its crudest form. The commercial designation as such was unquestioned by the Circuit and Appellate Courts. The Treasury Department, as shown by repeated rulings printed in an appendix to this brief, has always recognized its name and character and enforced its right to free entry.

See 16 Stat., 268, Rev. Statutes, Sec. 2505.
Act of 1883, 22 Stat., 521.

Under such circumstances, the rulings of the Department carry much weight in the courts.

Robertson vs. *Downing*, 127 U. S., 613.
U. S. vs. *Hill*, 120 U. S., 169, 182.
U. S. vs. *Wotten*, 50 Fed. R., 693, *affirmed in* 53 53 F. R., 344.
Swayne vs. *Hager*, 13 Saw., 621.

The Court of Appeals, in the case now at bar, decided that the general language of the Starch Clause, assessing duty on " starch or any preparation fit for use as starch " was, by reason of the *use* therein mentioned, a

more specific provision than the designation by commercial name. *Magone* vs. *Heller*, 150 U. S., 70, was found to be authority for this position. In this, we submit, that the Court was clearly wrong. We cannot see how an interpretation can be placed on that case which is so far at variance with understood rules. Under the ruling adopted, sago and arrowroot, both chemically pure starches and both on the free list, would also be dutiable. Tapioca flour is sometimes called Brazilian arrowroot (U. S. Dispensatory, p. 1754). It needs only the application of heat to make it pearl and flake tapioca, both well known food substances (find. III, p. 17.)

In *Solomon* vs. *Arthur*, 102 U. S., 208), it had been held that the words "manufactures of mixed materials, in part "of cotton," etc., were not a "name for goods." * * * "We think, said the Court, "it is very clear they are "merely descriptive." * * * "It is sometimes the "case, no doubt, that certain articles are so obviously "intended to be included in a particular grouping or "classification, as to *repel* any suggestion that they are "meant to be embraced in a different part of the law, "though literally applicable to them. But this can not "be said in the case now before us. *The goods in ques-* "*tion have no such inseparable relation to one form of* "*description exclusive of the other;* nor are they so clearly "intended to be embraced in any particular grouping "or classification, as to repel or prevent the application "to them of the clause under which they were as-"sessed."

If there can be no question of the fact that tapioca

flour commercially falls under the name of tapioca, we submit that it would be difficult, indeed, to find in the general words, "any preparation fit for use as starch," such an expression of the "obvious" intention of Congress as would "repel or prevent the application" to it of the rate of duty by designation *eo nomine*. If we consider, further, the fact that tapioca, sago, and arrow-root are all chemically pure starch, that they are all food substances, used in the sick room; that any of these articles may, to some extent, and by reason only of its starchy qualities, be used for laundry purposes, and that none of them can have any use except as starch in some way, and that this quality has been that which for years has made it desirable that the substances should be free, all of which facts "Congress must be presumed to have known," (*Dejonge* vs. *Magone*, 159 U. S., 567) we shall find ourselves driven, in support of the judgment of the Court of Appeals, to say that the free list, as to these articles, was intended by it *to have no operation whatever*, and that words used in all the tariff acts since 1870 ceased to have their well understood meaning when they were again used in the Act of 1890.

Magone vs. *Heller*, 150 U. S., 70, we submit, was not correctly read by the Court of Appeals. In that case this Court held that the intention of Congress to make free any chemical product (though by name dutiable), if it should be "expressly used for manure," was "*manifest*" from the fact that, in the clause declaring such manure substances free, articles otherwise dutiable

as chemical products, were mentioned by name as free, if of use for fertilizing the ground, within the meaning of the free list. This decision was within the rule of *Solomon* vs. *Arthur* (*sup.*), which conceded the possibility of an exception to the rule of specific designation in cases where " certain articles are so obviously intended " to be included in a particular grouping or classifica- " tion as to *repel any suggestion* that they are meant to " be embraced in a different part of the law, though " literally applicable to them."

But the starch clause contains no words manifestly, or in any way indicating that its terms shall include articles named in the free list, nor is there anything in *Magone* vs. *Heller* which justifies the assumption that, because an article on the free list may be used, by reason of its chemical qualities in place of starch, to some extent, it shall, therefore, be taken from that list and made dutiable as starch. The reasoning of this Court excludes the thought that if the words there under construction had been merely " manures and all substances fit for manure," it would have held that chemical products, dutiable *eo nomine*, were intended to be free because such products could be, in some degree, used for manure.

Mason vs. *Robertson*, 139 U. S., 624, would seem to deny to *Magone* vs. *Heller* the interpretation placed upon it by the Court of Appeals. In that case this Court held that bichromate of soda, though not mentioned *eo nomine*, was specially enumerated in the chemical schedule by the words " all chemical compounds and salts by

"whatever name known," and did not fall as a non-enumerated article, under the similitude clause, to be rated upon a comparison of "material, quality, texture, "or the use to which it may be applied." In the case at bar, the effort to make "tapioca flour" dutiable is based upon the general language of a clause providing for articles bearing similitude to starch in quality and use.

It seems to be clear that Congress did not intend that a substance, designedly placed by its commercial name on the free list because of its single and only chemical quality as starch, should also, because of that very same quality, be dutiable as a preparation fit for use as starch.

The Court below must have fallen into an error in holding that the indefinite and general language of the starch clause was a more specific provision than the designation *eo nomine* of the free list.

II.

The classification ordered by the Court was also erroneous, we respectfully submit, in its determination that tapioca flour was a preparation fit for use as starch because:

The imported article was not a "preparation." Again:

"Fitness for use as starch," within the meaning of the law, must mean fitness for use as commercial starch, which fitness must be shown by its predominant use for like purposes with commercial starch.

"Tapioca flour" is not a "preparation." It is a chemical starch, in its crudest and first form. It has

undergone no process of manufacture, no change since it was separated from the fibrous material of the plant by scraping and washing (find. III, p. 17).

The Revised Statutes (Sec. 2505) assessed starch in the following words: "Starch *made* of potatoes or corn, "one cent per pound, * * *made* of rice or any other "material, three cents per pound. * * "

The Act of 1883 said: "Potato or corn starch, two "cents per pound, rice starch, two and one-half cents, "other starch, two and one-half cents per pound."

Tapioca and cassava were on the free list of each of these laws.

In *Chung Yune* vs. *Kelly*, 14 Fed. R., 639, the question came before Judge Deady whether the very article now under consideration, which was "for the greater "part composed of starch granules and (which) may be "used for starch" was "starch * * made of rice "or any other material." The Court asked the jury whether the article was "a starch known to commerce "as such, and made and intended to be used primarily "by laundrymen in the stiffening and polishing of "clothes." It assented to the correctness of a verdict in the negative and held that the article was not "made or manufactured starch or known to commerce as such." It, also, held that its designation *eo nomine* made it free in any case.

In *Townsend* vs. *U. S.*, 5 C. C. A., 489, the Court of Appeals for the Second Circuit held regarding the same article, that it had "never been manufactured into commercial starch," though, chemically, a starch.

This last decision was upon the claim made by the Collector that "tapioca flour" was a "preparation fit for use as starch."

The Court of Appeals in the decision now asked to be reviewed held that the facts established the fitness of tapioca flour for use as starch. These facts were, *first*, its actual use in laundry work by Chinese laundrymen on the Pacific Coast and by some white laundrymen, who mixed the article with commercial starch to a slight extent; *second*, the general use of tapioca flour throughout the Eastern States for thickening colors, bookbinding, paper making, ink making, manufacture of a substitute for gum arabic, etc., etc., such uses being "for starch purposes." As pure starch can have no use other than as starch, in the chemical sense, the finding of the fitness of tapioca flour for use as starch is literally correct. Is this the use "as starch" intended by the Act of Congress to be the test of the dutiability of the imported article?

We submit that it is not. The actual use of tapioca flour for laundry purposes by a handful of Chinese on the Pacific Coast, does not prove fitness for use by the millions of inhabitants of the country. A fair practical illustration of this fact is found in the Appraiser's decision, No. 1817, reprinted on page 23 of this brief. "Olive oil for manufacturing or mechanical purposes and unfit for eating" was free under the Act of 1890. "Olive oil, fit for salad purposes," was dutiable. The imported article was shown to be used by large numbers of Italians and Spanish of the poorer classes in our

large cities for salad purposes, and one witness testified that it could be rendered fit for eating by "cutting down with cotton-seed oil." It was shown that the American people used the article for oiling machinery, not for eating. The Appraisers held that "fit for salad purposes" means "ordinarily regarded as fit for eating purposes, as determinable by its use for such purposes," and that the peculiar habits of a few thousand foreigners, brought from the home whence poverty had, perhaps, driven them, cannot control the classification of an article for 65,000,000 of people.

The fitness of tapioca flour for starch purposes has not been established by any proof of its use throughout the land. The findings and the evidence clearly show that such use is confined to a few foreigners in one part of the country. It has never had a place in the markets as commercial starch, or as a substitute for that article, notwithtanding the fact (found by the Court) that, previous to the imposition of the duty, it was much cheaper than manufactured starch, a circumstance naturally stated to be "significant" on this question in *Townsend* vs. *U. S.* (*sup.*). In the case last cited, the Court was presented with some testimony of its use in the laundry, but it considered the weight of the evidence to be against the fact of such use. It held that tapioca flour was "not manufactured in this country into the article known as starch" and that it "was not known as a substitute therefor," and that its actual use for purposes analogous to those for which commercial starch is used, did not make it "starch, or a preparation fit for

use as starch." The word "fit," as used in the tariff, means "commercially fit." (*Paper Co.* vs. *Cooper*, 46 Fed. R., 186.) Even "common use" does not of itself make a thing "suitable"; (*White* vs. *U. S.*, 69 Fed R., 93) it must be "actually, and not theoretically fit for use." (*Townsend* vs. *U. S.*, *sup.*)

It is well settled that neither the intention of the importer, nor the use after importation of any article, can determine its classification. (*Magone* vs. *Heller*, *sup.*) "In order to produce uniformity in the imposition of "duties, the dutiable classification of articles imported "must be ascertained by an examination of the im- "ported article itself, in the condition in which it is "imported. In order to be dutiable as 'watch mate- "rials,' the article, when imported, must be in such "form of manufacture as to show its *adaptation* to the "making of watches." (*Worthington* vs. *Robbins*, 139 U. S., 341) In other words, the fitness of the article for use in the manufacture of watches must be evident to the customs officer. "In order to be 'watch mate- "rials,'" said the Court, "the article must in itself "bear marks of its special adaptation for use in making "watches. The fact that the article in question was "used in the manufacture of watches has no relation to "the condition of the article as imported, but to what "afterwards the importer did with it."

The article now before this Court could be described by the customs officer by one name only. It is tapioca. No one would dream of calling it starch, or a preparation fit for use as starch. It bears no mark of "special

adaptation" to such use. If imported at New York or New Orleans, the closest inquiry would bring forth no knowledge of its fitness for any use other than as food, or as a chemical starch suitable to mix in colors, to make paste, ink, and hundreds of things. No one would say it was designed for use in the laundry.

This Court has determined that articles imported as "parts of clocks" are dutiable as such, if they are chiefly used as parts of clocks. If, however, they are as well applicable to mirrors or coach lamps as to clocks, they can then have no distinguishing characteristics as "parts of clocks."

Magone vs. *Wiederer*, 159 U. S., 559.
Sonn vs. *Magone*, 159 U. S., 418.

The Court below, in *Hartranft* vs. *Langfeld*, 125 U. S., 129, had charged the jury: "It is the use to which "these articles are chiefly adapted" (fitness for use), "and for which they are used that determines their "character, within the meaning of this clause of the "tariff act. * * * It is the predominant use to "which articles are applied that determines their char-"acter." The charge was affirmed by this Court and again approved by it in *Cadwalader* vs. *Wanamaker*, 149 U. S., 539.

See also *Robertson* vs. *Edelhoff*, 132 U. S., 624.

"Ordinary use" furnishes the guide for classification.
Sonn vs. *Magone*, 159 U. S., 421.

This Court in a late case said: "*Magone* vs. *Heller* "held that chief use was to be ascertained by that

"which was commonly, practically, and generally done, "and was not to be overthrown by an occasional excep- "tion for practical or experimental purposes."

Magone vs. *Wiederer*, 159 U. S., 562.

The phrase, "substances expressly used for manure," was decided in *Magone* vs. *Heller* to mean "substances "substantially available only for purposes as manure," *i. e.*, practically fit for use as manure only. If the language there construed had been "substances fit for use "as manure," the Court would, undoubtedly, have held "that 'fit for use' must be read to mean 'practically "'fit only for use as manure.'"

The finding of the Court in the case at bar was that tapioca flour was not "commonly used" for laundry purposes in the United States. Its chief use, and to say the least, a very large use, was undoubtedly in the manufactures, as stated in the findings.

Evidently the Court of Appeals considered this use to be a use "as starch." The article being a pure starch, chemically speaking, could not, in one sense, have any possible use except "as starch." Its one quality forbade its use for any purpose except such as needed, or was aided by, a chemical starch. We submit, however, that it was not the intention of Congress, when it used the words "fit for use as starch," to say that every chemical starch used in the manufactures should pay a duty as starch, but that preparations (of course, not otherwise specifically designated), *whose predominant use was as commercial starch*, should be dutiable.

Tapioca flour was neither sold or known as commercial starch, "or as a substitute for it, except, as we have seen, by the Chinese on the Pacific Coast, where among those dealing with this people, it is locally spoken of as "Chinese starch." It did have many uses as a chemical starch, *for which purposes Congress for twenty years before the Act of 1890 permitted its free entry into the country.* During all this period starch, *i. e.* commercial starch, was dutiable. Nothing can be clearer than the fact that during this interval Congress recognized the distinction between the uses of commercial starch and mere chemical starches. During the same period the Treasury Department again and again declared that "tapioca flour" was not starch, though its uses were brought before it. Judge Deady held that it was not starch. (*Chung Yune* vs. *Kelly*, 14 Fed. R., 639) His judgment was not appealed from. Again, in *Tong Duck Chong* vs. *Kelly*, 24 Fed. Cases, p. 76 (No. 14,093), the same distinguished judge held that sago flour was not dutiable as starch, though chemically such, and though it was shown to be used for laundry purposes.

If, during all these years, tapioca flour has always been known to the tariff as tapioca and not as starch, *its use as food and in the manufactures during the same period has been as "tapioca" and not "as starch."* The re-enactment of the free list in the Act of 1890 in the same words as had been used for so long a time was, under a well-settled rule, a declaration by Congress that tapioca flour should continue to be free for the uses to which it had always been put. In this particular case,

the necessity of the application of the rule becomes apparent, in view of the fact that unless this be done, the designation *eo nomine* as free will have absolutely no meaning at all. Pure starch can have no use except as starch. Tapioca flour, a pure starch, can be used only for starch purposes.

It was long ago decided by this Court that where an article has been for years held dutiable under a specific designation in a tariff which also contains another clause under which the article would be dutiable in the absence of the first, a change in the tariff dropping the clause under which the article had previously been classified and retaining the other, would have the effect of making the article *a non-enumerated article*. Though within the words of the retained clause, it would not be within its meaning, because Congress, under the former acts, had indicated that it should not be so classified.

De Forest vs. *Lawrence*, 13 How., 274.

The converse of this proposition must be equally true. A classification, long existing, will be deemed to have been intended to continue when the article is referred to in a new law by the same words as in former acts, to the exclusion of a possible classification under another and novel clause which may, by general descriptive words, seem also to include the article.

The place given to the free list in the statute, subsequent to that of the starch clause in the same Act, should not be lost sight of. If the construction placed upon the starch clause by the Court of Appeals that tapioca flour is fit for use as starch be correct, then *ut*

magis valeat res quam pereat, the later clause should prevail, "as indicating the last and final expression or "determination of the lawmakers."

Powers vs. *Barney*, 5 Bltchford, 202.

On the hearing of this cause it was agreed that either party might offer the decisions of the Treasury Department to prove its practice regarding the assessment of duties on tapioca flour. (Trans., p. 29.)

We print these decisions as an appendix to this brief. We also beg to be allowed to refer the Court, if it seem to be worth its attention, to the testimony on the subject of the use of tapioca flour as commercial starch, *i. e.*, for laundry purposes, and the opinions given regarding its fitness for such use.

We submit, respectfully, that the petitioner should be granted the writ prayed for.

CHAS. PAGE,
Attorney for Petitioner.

APPENDIX

DECISIONS OF TREASURY DEPARTMENT, 1877–1890.

(3161.)

TAPIOCA FLOUR—FREE ENTRY OF.

Treasury Department, March 23, 1877.

Sir—The Department is in receipt of your letter of January 16 last, submitting the appeal (2972 e) of Mr. C. Wakefield from your assessment of duty at the rate of 20 per cent. ad valorem on certain tapioca flour imported by him, per "Marmion" from Singapore, December 28, 1876, and claimed to be entitled to free entry under the provision for "tapioca," in the free list, Revised Statutes.

It appears, upon investigation, that tapioca is prepared in three forms, namely: flake, pearl, and flour, and that these terms do not indicate any substantial difference in the character or quality of the article, but merely indicate its form or appearance.

The Department is of opinion that the tapioca flour in question is entitled to free entry, as claimed by the importer, and you are authorized to readjust the entry accordingly, and to forward a certified statement for the refund of the duties exacted thereon.

Respectfully,

JOHN SHERMAN,

Secretary.

Collector of Customs, Boston, Mass.

(5802.)

FREE ENTRY—TAPIOCA FLOUR.

Treasury Department, July 7, 1883.

Sir—The free list of the Act of March 3, 1883 (T. I., new, 772), provides for "root flour," and also (T. I., new, 800), for tapioca, cassava, or cassada.

The Department holds that, under these provisions, flour made from tapioca, cassava, or cassada root may be admitted free of duties, without regard to the use for which it is ultimately intended, and, consequently, that the provision (T. I., new, 269), of the tariff for "other starch" does not apply to such flour.

You will take action accordingly.

Very respectfully,

H. F. FRENCH,
Acting Secretary.

Collector of Customs, San Francisco, Cal.

(7971.)

TAPIOCA—FREE OF DUTY, THOUGH SPECIALLY IMPORTED FOR AND USED AS STARCH.

Treasury Department, January 11, 1887.

Sir—The Department is in receipt of your letter of the 25th of October last, transmitting the appeals (8788 o, 8789 o, 8790 o, and 8791 o), of Kwong Hang On & Co., Chy Lung & Co., Lun Kwong Chong & Co., and Tong Foo & Co., from your decision assessing duty at the rare of 2½ cents per pound on certain starch imported by them under various names, such as sago, sago flour, tapioca, &c., per "San Pablo," "Rio de Janeiro,"

and "St. David," August 9 and September 7 and 9, 1886, respectively, and claimed to be exempt from duty under the provisions in the free-list (T. I., new, 772, 774, and 800), for "root-flour," "sago, sago crude, and sago flour," and "tapioca, cassava, or cassada."

It appears that you classified the article in question under the provision in Schedule G (T. I., new, 269), for "other starch," for the reason that it is imported, and is actually used as starch by the Chinese laundries throughout the States and Territories.

It was, however, decided by the Department on July 7, 1883 (Synopsis 5802), that under the above-cited provisions in the free list, flour made from tapioca, cassava, or cassada root may be admitted free of duties, "without regard to the use for which it is ultimately intended," and the collector of customs at New York, to whom the samples forwarded with your letter had been submitted, reports, under date of the 29th ultimo, that while the merchandise represented by the samples was found by the United States chemist to be chemically a starch obtained from the root of "Janipha manihut," or "Jatropha manihot," it is in its commercial character "tapioca;" that it is so returned by the appraiser under Synopsis 3161, and that on such return the merchandise is admitted free of duty at his port.

In view of this report, and of the above-cited decisions of the Department, and the provisions in the free list referred to by the appellants, you are hereby authorized to reliquidate the entries specified in said

appeals, exempting the merchandise covered thereby from duty.

Respectfully yours,

C. S. FAIRCHILD,

Assistant Secretary.

Collector of Customs, San Francisco. Cal.

(9031.)

ROOT-FLOUR OF TAPIOCA, FREE OF DUTY, THOUGH INTENDED FOR USE AS A STARCH.

Treasury Department, September 21, 1888.

Sir—The Department duly received your letter of the 30th of April, 1888, transmitting the appeal (1392 s) of Messrs. Kwong, Cheong Hing from your decision assessing duty at the rate of 2½ cents per pound on certain so-called "flour" imported into your port, per "Lennox," July 25, 1887, claimed by the appellants to be free of duty under the provisions in the free-list (T. I., 772) for "root-flour," and originally returned by the appraiser at the rate assessed under the provision in Schedule G (T. I., 269) for "other starch."

The appraiser, in his report of the 20th ultimo, called for by the Department on the 14th of May last, states that samples of the merchandise in question were submitted to the United States chemist at your port, who found the article to be tapioca starch, and that, in view of Department's decision of July 7, 1883 (Synopsis 5802), and January 11, 1887 (Synopsis 7971), which hold that flour made from tapioca, although chemically a starch, may be admitted free of duties under the pro-

vision for "tapioca" (T. I., 800), without regard to the use for which it is ultimately intended, the appeal would appear to be well founded.

You are, therefore, authorized to reliquidate the entry, and to take measures for refunding the duties exacted.

Respectfully yours,

I. H. MAYNARD,
Acting Secretary.

Collector of Customs, New York.

(13545. G. A. 1817.)

OLIVE OIL UNFIT FOR SALAD PURPOSES.

Before the U. S. General Appraisers at New York, November 2, 1892.

In the matter of the protests, 1604 b—7436 of E. J. Lavino & Co., against the decision of the Collector of Customs at Philadelphia, as to the rate and amount of duties chargeable on certain olive oil, imported per "British Prince," April 5, 1892.

Opinion by Somerville, General Appraiser.

The merchandise in question is olive oil, imported from Smyrna, in April, 1892.

The local appraiser at Philadelphia reports that in his judgment "it is not fit for table use, although it is undoubtedly so used by certain classes of foreigners among us."

The importers, in the hearing held at Philadelphia, testified that it was imported in bond and was shipped by thousands of tons from Smyrna to England, Ger-

many, and America, for use as machinery oil; that they sold it to wool manufacturers, and had never been able to find a customer who would use it for eating purposes.

One witness, who dealt in olive oil, testified that it is rendered fit for eating purposes by being "cut down with cotton-seed oil." All the witnesses concur in the conclusion that it is a very low grade of olive oil, and the weight of the testimony is to the effect that it is not ordinarily used as a salad oil or for eating purposes by persons generally in this country, but only by a certain class of Italian citizens, who exclusively use it.

The examiner of oils in the appraiser's department at New York testifies that such oil is "used by Italians in large numbers in New York City," and by some Spaniards, but "not by Americans to any extent," or by any other classes.

The merchandise was classified by the collector, under paragraph 44 of the new tariff act, as "olive oil, fit for salad purposes," and assessed at 35 cents per gallon.

It is claimed as free of duty under paragraph 661, "as olive oil for manufacturing or mechanical purposes, unfit for eating, and not otherwise provided for" in said tariff act.

We are of the opinion that the phrase "fit for salad purposes" means ordinarily regarded as fit for eating purposes, as determinable by its use for such purposes. If it is only used by a small class of persons (a few thousand at most) of a particular nationality, or who immigrate from a particular country (it may be from stress of poverty or from national idiosyncracy), that

fact does not control the classification for the sixty-five millions of inhabitants of this country.

We accordingly find as facts:

(1) That the olive oil in question is fit for manufacturing and mechanical purposes and was imported for that use, and is commonly and chiefly used for such purposes.

(2) That it is rarely used for eating or salad purposes, and then only by a small class of citizens, mainly Italians; and that it is not fit for salad or eating purposes within the meaning of the present tariff act.

The board passed on an importation of olive oil substantially of the same kind with this, in decision G. A. 565, and held that it was not fit for eating purposes.

The protest is sustained and the collector's decision reversed. He is instructed to reliquidate the entry accordingly.

The Evidence as to the Fitness of Tapioca Flour for Use as Starch.

In the case at bar, the fitness of the article for use as starch, so far as reliance is placed on actual use, is insisted upon, because a few hundred Chinese laundrymen throughout this coast avail themselves of it for laundry purposes. Whether they mix it with wheat or corn starch in their work, we do not know, but the few American laundrymen who testified to its uses, all agree that it is good for mixing purposes only. (*Williams*, 113; *Doherty*, 118.) The last named witness mixes it in the ratio of one-tenth. (120.) Some of the laundry-

men produced specimens of starched clothes which had been made up by themselves with "China starch." They thought good work could be done with it, but on cross-examination they all declined to admit that the results produced before the Appraisers were good specimens of what their laundries could do. (*Bartlett*, 116; *Ferguson*, 135.) *Bartlett*, 115, said there was more economy in the more expensive starches; they do quicker and better work. An employee will do one-third more work with better starch. If wheat starch did not do better in working every day, he would not pay almost double for it. (117.) *Doherty* admits that China starch was largely cheaper than American starch a few years ago, and says he would not care about using it alone. (120.) *Ferguson* says he does not consider the work done by it to be superior work. (137.) These witnesses prove that the article cannot be profitably used as starch. Price, the chemist, says that, in all his reading and experience, he had never come across any mention of the use of the article for laundry purposes. (100.) These witness were produced by the Collector.

Falkenau (193), the chemist, made a practical test of the article, as a starch. He found that it took a longer time to boil than wheat or corn starch. *Cumbalk*, the dealer in starches, says that the superiority of wheat over corn starch lies in the quickness of the penetrating power of the former, and thereby its labor saving quality, (224). Falkenau further found that the "tapioca flour," *after boiling*, showed more unruptured cells.

The rupturing of the cells releases the starchy substance and makes it available. The presence of unbroken cells makes the starch rough. The color of garments starched with it was not as white. It was of a yellowish cast, and did not appear as smooth. There was, also, a peculiar odor to it. (194.)

It is thus evident that the article, though actually used by a class in San Francisco and vicinity for starching purposes, and, though susceptible of being manufactured into starch, is not fit for use as starch *in the commercial meaning of the words.* It is not accepted by the community at large, because it yields less of the starchy substance, requires more labor in its application, and does not do good work. Its results are neither white nor smooth, the essentials of starch, as known to commerce. These elements determine its unfitness, commercially, as a competitor with other starches.

Cumbalk (221), who has visited all the steam laundries, almost, of the country, never heard of the use of the article in question as starch.

No. 202. 36

Add'l Br. of Comstock for Appt.

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Office Supreme Court U. S.
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JAMES H. MCKENNEY

Filed April 17, 1899.

Supreme Court of the United States.

CHEW HING LUNG ET AL.,
Appellants,

vs.

JOHN H. WISE, Collector,
Appellee.

ADDITIONAL BRIEF ON BEHALF OF APPELLANTS.

ALBERT COMSTOCK,
Of Counsel.

C. G. Burroughs, Walker and Centre Streets, N. Y.

Supreme Court of the United States.

CHEW HING LUNG ET AL.
Appellants

vs.

JOHN H. WISE, Collector,
Appellee.

Additional Brief on Behalf of Appellants.

It is entirely clear that this case would not have been decided in favor of the Collector by the Circuit Court of Appeals, had not that court conceived that a different state of facts was shown, on the record herein, from that established in the Townsend case (56 Fed. Rep. 222), wherein the Circuit Court of Appeals for the Second Circuit decided the identical question now presented, in precisely the opposite way. The writer having been of counsel for the importers in the Townsend case, begs permission to present this additional brief herein, in order to enforce still further the assertion that there is no difference between that case and this on the facts, that that decision fully covers this case, and that the correct application of the law to the proven facts of both cases was that of the court in the Eastern circuit.

Careful comparison of the two decisions shows that the California court avoided taking issue with that at New York directly, on the doctrines of law asserted by

the latter, but on supposed differences in the proven facts, felt compelled, while conceding that the free list provision aptly designated the product, to consider a resultant conflict between that and the duty provision (for starch), which conflict the court at New York had found non-existent, because on the proven facts it was held that the duty provision was not applicable to tapioca flour at all.

For convenience in connection with this discussion, we have printed the decision in the Townsend case as an appendix hereto, and it will there be seen that the court dismissed the question of conflict in the following words :

> " If tapioca flour was, in our opinion, a preparation fit for use as starch, the question would have arisen whether it was specially provided for under paragraph 323, but, the conclusion being that it was not such a preparation, it has a place only in the free list."

Starting from the sound rule that the construction will always be favored which avoids, rather than that which produces conflict, we think it can be shown by the record that the differences supposed by the California court were chiefly imaginary, and so far as they existed, were wholly inconsequential. As stated in the opinion of the Circuit Court of Appeals they were as follows :

1. That the cost of the substance in controversy, including the duty appealed from, was substantially as great as that of ordinary starches, whereas the evidence in the Townsend case had indicated a lower cost for tapioca flour than for any starch.

To this we answer: the testimony in the Townsend case referred to the cost on a duty-free basis, that having for many years prevailed, as the present record amply shows, until about the date of that case. Hence the comment of the court at New York, that "The very suggestive evidence of the unsuitableness "of tapioca for commercial use as starch is, that al- "though it is much cheaper than starch made in this "country, it does not come into commercial competi- "tion with starch made here,"—remains of undiminished force. It may be well to note that this comment was based on the testimony of Duryea, the president of the domestic starch-makers, that he had never heard of tapioca flour in his commercial experience of 37 years, although he had manufactured and sold starch from "generally the range of substances from which starch is made." The California court seems impressed with the idea that in the present case it is shown that the product does compete with ordinary starch. But the record shows that many wholesale grocers and starch dealers do not carry it or know it, even in San Francisco, and we think it clear that the petty use of it by Chinese does not rise to the dignity of competition. As to any other use of it as starch, that is for discussion anon.

2. That the substance in controversy was known on on the Pacific coast as "Chinese starch," and is largely used by the Chinese for the starching and stiffening of clothes, and to some extent by white people in their laundry work,—whereas in the Townsend case the court had said that the same article had never been sold as a starch, and was not considered in this country as adapted to the ordinary purposes of starch.

Our answer to this is: the supposed difference did not exist in the testimony as to the article and its use and reputation, but was really a difference in the relative values allowed to facts by the two courts. There was proof in the Townsend case,—direct, from Col-

lector's witnesses, and admissions from the importers', that tapioca flour was used in laundries, either alone or in admixture with starch of corn or wheat, and also that it was fit for such use, because it was a starch. But it appeared to be a petty or exceptional use, and by intimation it was only among the Chinese. Thus it was just such a use, in sort and in amount, as was dwelt on by the California court in the present case. And if this be the only use as starch shown for tapioca flour, there would seem little room for doubt that the court in New York was fully justified in ignoring it. Indeed, the unimportance of the fact that tapioca flour can be, or is, mixed with starch for use in the laundry, is sufficiently demonstrated by the evidence in the present record, that *stearine* is also thus mixed with starch. It is of course that any white powder, soluble in water, could be used in the same way, but as a rule they would be mere adulterants,—cheapeners,—not advantageous to the results obtainable,—and tapioca flour seems fully within such rule.

3. The opinion in the present case proceeds to allege: "It is further shown that the same article is imported from China and used in the Eastern States for starch purposes, by calico printers and carpet manufacturers, to thicken colors; in the manufacture of paper; for book binding; filling in painting; manufacture of a substitute for gum arabic and other gums, and also as an adulterant for candy, and other articles."

Were this allegation well founded, we should perhaps have to resolve a conflict between the duty provision for starch and the free list provision for tapioca. But it is not well founded, and we have studied the record with interest to see how it first appeared. Nothing in the evidence supports it, and it seems to have crept unnoticed into the findings in the circuit court. That tapioca flour is used for every one of the specified purposes is clearly proven, but that any of them are "*starch purposes*" is not even suggested by any evidence.

Paragraph 5 of the stipulation as to facts, (R., p. 17) sets forth the uses, but nowhere describes them as uses "for starch purposes." Beyond doubt this stipulation was based on the testimony in the Townsend case, the record in which we believe was in the hands of counsel on both sides when the present case was before the referee. And the very witnesses in that case who gave evidence of these several uses, declared that they never knew tapioca flour to be used as a starch. Indeed it would involve an abdication of our reasoning faculties to suppose them "starch purposes" in the sense of paragraph 323. Colors are probably oftener thickened with wheat flour than with any other substance. Is that, then, "starch"? Or such use a "starch purpose"? There is not a word of evidence that "starch", in the common acceptation of that word, was ever used to thicken colors with. Nor was starch supposably ever used in the manufacture of paper. For book binding glue, glue paste, flour paste and various animal sizings are used, but starch, we think never. Gum arabic is not starch, and the manufacture of a substitute for it is not a "starch purpose." And surely, if starch is used to adulterate candy, so are *terra alba*, chalk, and numerous other substances, so that to call that a "starch purpose" involves a violent assumption, and in the words of the court in the Townsend case (concerning a finding by the general appraisers) "hardly warrants the stress that was laid on it."

Of course it is clear that Congress did not employ the word "starch" in paragraph 323 of the law of 1890 in any such broad sense as to include the whole class of products used in sizing, stiffening and the like. An examination of paragraph 324, in which many of them (Dextrine, Burnt starch, Gum substitute, British gum) are designated at a less rate of duty, demonstrates that, if demonstration were needed.

Yet on this unfounded assumption by the California court, the decision of that court must chiefly have pro-

ceeded. For the other supposed differences between the facts in this and in the Townsend case cannot be thought to have led the court into asserting as to tapioca flour a conflict between the two provisions involved. As a matter of fact, in harmony with the stipulation when properly read, tapioca flour is employed, to the extent of a preponderance so great as to constitute nearly its entirety, as a body for liquid colors in printing calicoes, to facilitate placing the colors on the fibre, after which it is steamed and washed away. In this use it would appear from the record that it does not come into either competition or contact with starch at all.

Were there conflict between the starch provision and the free list, no light whatever could be derived, for its settlement, from the disappearance of the provision for "root flour" for the free list of the Act of 1890, which the California court thought important, for the reason that tapioca flour, a known and recognized variety or form of tapioca, was never free as a root flour, but always under the specific denomination of "tapioca, cassava or cassady." *That* provision was not dropped from the free list in 1890, nor has it yet been dropped. Under that, and no other, had the Treasury department for nearly 20 years held tapioca flour free, and so far from seeing in the changes of 1890 an intent to end its right of free entry, it is to us inconceivable that Congress, with any such intent, would have left the oft-construed provision for "tapioca, cassava or cassady" in all its fulness in the free list of the law. Those words had long before come, by contemporaneous construction, to include and designate tapioca flour, as is apparent from the résumé of Treasury decisions in the brief heretofore filed for appellants; hence when Congress again employed them unchanged, it surely employed them

with an unchanged intent to include and designate this substance.

Nor is the language of the starch provision in the law of 1890 one whit more exhaustive than that of the like provisions of those earlier acts in which it had stood for decades, side by side with the provision for tapioca, which the Treasury said prevented tapioca flour from assessment as starch. Will any one maintain that the provision of 1890 covers any more starch than that for "potato or corn starch, rice starch *and other starch*" in the Act of 1883?

Such supposed conflict would be as little enlightened by the decision of this Court in *Magone vs. Heller*, 150 U. S. 70.

The free list provision therein held to oust a specific provision for sulphate of potash, was as follows: "Guano, manures, and all substances expressly used for manure." It was the precise force of these words, on which the decision of the case rested;—recast the provision to make it parallel with that for starch, and it would become "all substances used for manure";—language which this court would unquestionably hold should defer to a provision for sulphate of potash. Recast the starch provision into parity with that in the Heller case; it would then be "all substances *expressly* used as starch", and this description would completely exclude tapioca flour, whose use as "starch" is its least prevalent use.

It cannot fairly be maintained that paragraph 323 is more specific than paragraph 730, as including only one of the three commercial forms of tapioca, for it is

clear that on the narrowest construction, the starch provision covers four or five known varieties of commercial "starch," while on the construction which would make it include tapioca flour at all, it would, as we hereafter point out, be of almost unlimited scope. On the other hand, paragraph 730 includes but one substance which could come within any construction, however broad, of paragraph 323, and is a designation of only three substances, or three forms of the same substance. So that from any point of view, and were there not readier solutions at hand, the free list provision would take precedence as the more specific, pursuant to the established rule of interpretation.

Still considering an assumed conflict, the proven relation between the three forms of tapioca, whereof the first and crudest is the flour, logically forbids its exclusion from the free entry which is accorded to pearl and flake, preparations from it. It has never been the method of any tariff law to tax raw, or relatively raw materials, while admitting their advanced forms to free entry. And in the present instance the wording of the free list provision points out this substance, tapioca flour, with singular precision. In view of the proven commercial designation, the one word "tapioca" would evidently have sufficed to designate all three forms. But Congress has added a specification of "cassava or cassady," which words refer to nothing, and no form of thing, known as an article of commerce, except tapioca flour. The Century Dictionary gives the common meaning of "tapioca" as "a farinaceous substance prepared from cassava by drying it while moist upon hot plates," and defines cassava as the first starchy product from the roots of the plant. All forms of tapioca are thus

cassava in substance, but pearl and flake are prepared from it only by means of physical changes in their cell structure, while tapioca flour alone is cassava *per se*.

Again, the intent to have this substance admitted free is further made evident when we examine paragraph 492,—a provision carried unchanged through many acts. As already shown, the primary use of tapioca flour is in that branch of dyeing known as calico printing, and it is an article *in a crude state* so used. Par. 492 is a residuary clause comparable to those at the end of the metal, the glass, and other schedules, and its object is that if any crude material of the dyeing and tanning industries has not been clearly made free elsewhere (as most of them have), this shall declare it free beyond cavil.

There is probably nothing more entirely within the realm of common knowledge than that the recognized "starches" of commerce and the arts are wheat, corn, potato and rice starches. All these are extensively and primarily used in the laundry, the country over, by our own citizens of all nationalities, and are carried by all dealers, as "starch." Step outside this short, practical list, and we at once find ourselves confronted with a range of substances comparable almost to the constellations of heaven. Every plant in the world's vast flora yields its own especial *starch*. It is inconceivable that the starch paragraph in the tariff law was meant to invite Collectors to the discovery of all the *starches* imported, or their adaptability to use. The Century Dictionary is unable to provide a more specific definition of "starch" than "a proximate principle of plants",—followed by half a column of description of its chemical characteristics, and ending with the significant statement that "starch forms the greatest

part of all farinaceous substances, particularly of wheat flour." By other paragraphs of the act under discussion, Congress has shown that it entertained no such conception of what was "starch" under paragraph 323. Thus in Schedule G, cornmeal, oatmeal, rice flour, rye flour and wheat flour are successively provided for by name,—a labor entirely useless if every preparation chemically starch is to go to paragraph 323. The same comment might be equally applied to the designations of arrow root, farina and sago flour in the free list. All are *starches* in the same chemical sense as is tapioca flour. It seems clear that Congress meant the word "starch" in paragraph 323, just as it meant the word "salt" in paragraph 322, to refer to the common and received sense of the word as when used alone. There are probably even more *salts* than there are *starches*, but it has never been held that all must find place, for duty purposes, under paragraph 322. Chloride of sodium is the only chemical salt taxed there, out of the thousands of salts known to commerce and the arts.

This is in harmony with the doctrine asserted by this court in *Lutz vs. Magone, 153 U. S. 105*,—that the tariff status of an acid was not conferred on an article merely because by abstract chemical tests it was an acid, while not fulfilling the received notion of the character of acids.

On the same branch of the case is the consideration that tapioca flour never appears in the general markets of the country (we do not refer to the local San Francisco market) under any name of which "starch" forms a part. Probably the designations of the trade draw precisely the distinction which Congress intended should limit the operation of paragraph 323. One hears everywhere of "corn starch," "wheat starch," "rice starch," "potato starch":—who ever heard of "tapioca starch"? The name does not exist. Tapi-

oca flour therefore is not within any generally received sense of " starch " ; it is not by commercial designation a starch ; and it is, on the proofs in the case at bar, palpably unfit for the primary use of starch. Hence we conclude, with the Circuit Court of Appeals in the Second Circuit, that there is no conflict, as to this substance, between the starch paragraph and that in the free list which specially designates it.

ALBERT COMSTOCK,
of Counsel.

APPENDIX.

TOWNSEND V. UNITED STATES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

* * * * * *

SHIPMAN, Circuit Judge, delivered the opinion of the Court.

The appellants, J. R. Townsend & Co., in April, 1891, imported into the Port of New York three hundred and seventy-three bags of tapioca flour. The collector assessed a duty of two cents per pound thereon, under paragraph 323 of the tariff act of October 1, 1890, 26 Stat. 567, 588, c. 1244, which imposed that duty upon "starch, including all preparations, from whatever substance produced, fit for use as starch". The importers protested against this assessment upon the ground that the article was free of duty, under the provisions of paragraph 730 of the same act, which included in the free list "tapioca, cassava, or cassady". The Board of General Appraisers affirmed the decision of the collector, and the Circuit Court, while rejecting some of the reasons that led them to their conclusion, hesitatingly affirmed their decision. The importers appealed from the judgment of the Circuit Court.

The article which is commercially known in this country as "tapioca" is obtained from the tuberous roots of the cassava or manioc plant, which is a native of Brazil. It is imported into this country in three forms, -pearl tapioca, flake tapioca and tapioca flour. The first two forms are exclusively used for food. Tapioca flour is also known commercially as tapioca, and is used to a slight extent for the thickening of soups, but mostly by calico printers and carpet manu-

facturers to thicken colors, and in the manufacture of a substitute for gum arabic or other gum. There was testimony that it is also used for the sizing of cotton goods, a purpose for which starch is also used to a certain extent. The weight of the testimony is that it is not used for laundry purposes. It is chemically a starch, because eighty-five per cent of it consists of starch. It is not manufactured in this country into the article known as " starch ", and it is not known as a substitute therefor.

In the Revised Statutes, and in the tariff act of March 3, 1883, 22 Stat. 488, 503, 521, c. 121, starch made of any material was dutiable, and tapioca, cassava, or cassada, as well as root-flour, were upon the free list. The statute of 1890 enlarged the provision in regard to starch, by including in the same paragraph " all preparations, from whatever substance produced, fit for use as starch ". The Circuit Judge, disagreeing with the Board of General Appraisers in their opinion that tapioca flour was not suitable for food, and was not known by the designation of tapioca, and was not in fact tapioca, was of the opinion that it was the intention of the framers of the act of 1890 to make the provision with regard to starch more comprehensive than it was before, and, if this article was in such a state of preparation as to be fit for use as starch, that it should pay the duty required by paragraph 323. He adds : " While the testimony is not altogether clear upon that precise point, I am unwilling, upon the record as it stands, to disturb the finding of the board, that the article imported here is fit for use as starch, and that being so, the conclusion follows that it is dutiable under paragraph 323 ".

The decision of the appeal turns upon the question, whether, under the testimony, tapioca flour can be considered as a preparation for use as starch. The article has never been sold as a starch, and is not considered in this country as adapted to the ordinary purposes of

that article, and has never been manufactured into commercial starch, but it is chemically a starch. The term "preparations * * * fit for use as starch" means preparations which are actually, and not theoretically, fit for such use, and which can be practically used as such, and not those which can be made by manufacture fit for such use. Tapioca flour is used for purposes which are analogous to those for which starch is used. It is not used, though it probably could by adequate preparation be used, for the same purposes, unless its use as a sizing can be called the same purpose. The testimony of the witness upon that subject was not sufficient to justify the stress which the Board of General Appraisers placed upon it. The very suggestive evidence of the unsuitableness of tapioca for commercial use as starch is, that, although it is much cheaper than starch made in this country, it does not come into commercial competition with starch made here.

The appellants make the point that the language of the free list exempts from duty the articles specified therein, "unless otherwise specially provided for in this act," and that tapioca is not specially provided for except in the free list. If tapioca flour was, in our opinion, a preparation fit for use as starch, the question would have arisen whether it was specially provided for under paragraph 323, but, the conclusion being that it was not such a preparation, it has a place only in the free list.

The judgment of the Circuit Court is

Reversed.